

11 U.S.C.. § 1225(a)(6)
feasibility
negative amortization

In re Nauman, Case No. 396-36120-elp12; BAP No. OR-97-1264-JHN

9/18/97

BAP, aff'g ELP

published

The bankruptcy court confirmed debtors' Chapter 12 plan for reorganization of their cattle ranch. The BAP affirmed. The bankruptcy court found that the plan was feasible. There was conflicting testimony about whether the ranch capacity would support debtors' proposed operation, whether debtors' projection of cattle prices were supported, whether debtors' plan provided for any margin to cover unexpected contingencies, and whether there was any allowance for variances in cattle survival rate. The trial court's resolution of those factual issues, resulting in the conclusion that the plan was feasible, was not clearly erroneous.

The bankruptcy court did not err in allowing a negative amortization plan. Although the bankruptcy court was not bound to apply the factors set out in Great Western Bank v. Sierra Woods Group, 953 F.2d 1174 (9th Cir. 1992), its application of those factors was not error.

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re:) BAP No. OR-97-1264-JHN
)
JEFFREY CHARLES NAUMAN) Bk. No. 396-36120-elp12
BRENDA SUE NAUMAN,)
Debtors.)

GARY L. MILLER; JUNE W.
MILLER; JOHN P. BELZA;
VIRGINIA D. BELZA;
Appellants,
v.)

JEFFREY CHARLES NAUMAN;
BRENDA SUE NAUMAN; FIRST
SECURITY BANK; ROBERT K.
MORROW, TRUSTEE; UNITED
STATES TRUSTEE;
Appellees.)

FILED

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NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

O P I N I O N

Argued and Submitted on August 21, 1997
at Portland, Oregon

Filed September 18, 1997

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Elizabeth L. Perris, Bankruptcy Judge, Presiding

Before: Jones, Hagan, and Naugle¹, Bankruptcy Judges.

¹ Hon. David N. Naugle, Bankruptcy Judge for the Central District of California, sitting by designation.

1 Jones, Bankruptcy Judge:

2 The bankruptcy court confirmed the Debtors' Chapter 12
3 Family Farmer Reorganization Plan by its order of February 27,
4 1997. Creditors Gary and June Miller and John and Virginia Belza
5 ("Miller-Belza"), who sold the ranch property to the Debtors, now
6 appeal the confirmation order. Specifically, the Appellants
7 argue that the bankruptcy court erred in that the Debtors' plan
8 fails the feasibility requirement of § 1225(a)(6).² Miller-Belza
9 also argue that the plan involves negative amortization of the
10 ranch property, and that the negative amortization plan does not
11 meet the factors approved by the Ninth Circuit in Great Western
12 Bank v. Sierra Woods, 953 F.2d 1174 (9th Cir. 1992). We **AFFIRM**
13 the decision of the bankruptcy court.
14

15 I. FACTS

16
17 The Debtors, Jeffery Charles Nauman and Brenda Sue Nauman,
18 acquired a cattle ranch in central Oregon in February of 1995.
19 The ranch consists of two separate properties: the Keyes Mountain
20 parcel is approximately 2,768 acres and the Ranch Site parcel is
21 approximately 2,582 acres. The Naumans originally sought to
22 acquire only the Ranch Site parcel. The Appellants, the Millers,
23 were interested in purchasing only the Keyes Mountain property.
24 Mr. Miller is a California real estate broker. The then-owner of
25

26
27 ² Unless otherwise indicated, all references to Chapters,
28 Sections and Rules are to the Bankruptcy Code, 11 U.S.C. §§ 101, et
seq., and to the Federal Rules of Bankruptcy Procedure, Rules 1001,
et seq.

1 the parcels was unwilling to sell only one parcel at a time.
2 Ultimately, a deal was struck in which the Appellants, the
3 Millers and the Belzas, would purchase both parcels and
4 simultaneously sell the Ranch Site property to the Naumans.

5 In January of 1995, the Millers and Belzas purchased both
6 parcels. The Ranch Site property was purchased for \$775,000.00.
7 The agreement required annual installments of \$50,194.00. The
8 first payment, however, was to be \$46,829.42. The balance would
9 be due in January of 2005. Miller-Belza also purchased the Keyes
10 Mountain property for \$725,000.00 with annual installments of
11 \$34,845.00. The balance on this property would also be due in
12 the year 2005.

13
14 Miller-Belza sold the Ranch Site property to the Naumans on
15 the same day that Miller-Belza acquired it from the previous
16 owner. The sale contract between the Naumans and Miller-Belza
17 for the Ranch Site property required a purchase price of
18 \$775,000.00, with a \$300,000.00 down payment. The remaining
19 \$475,000.00 was to be paid in annual installments with an 8.5%
20 interest rate. The annual installments were to be \$50,218.00,
21 with the exception of the first year, in which the payment was to
22 be \$42,032.38. The annual payments were to continue until
23 January 3, 2005, when the full balance would be due. The sale
24 contract gave Miller-Belza the right to foreclose on the property
25 in the event of default. The Naumans also acquired grazing rights
26 to the Keyes Mountain property.

27 The Naumans failed to make the 1996 payment on the Ranch
28

1 Site property and filed for bankruptcy protection in August of
2 1996. - The value of the property at that time was estimated at
3 \$750,000.00. Two debts are secured by the Ranch Site property.
4 The first was the Miller-Belza debt in the amount of
5 approximately \$545,000.00, and the second was a deed of trust in
6 favor of William Nauman, the Debtor's father, for \$91,000.00.
7 Another loan by First Security Bank for \$100,000.00 is secured by
8 the cattle herd.

9 The Debtors have some experience in the cattle industry.
10 Testimony in the lower court indicated that prior to the purchase
11 of the Oregon property, Jeffrey Nauman had operated a cattle
12 ranch in Idaho. He is a member of the Oregon Cattlemen's
13 Association, he was selected to represent Oregon on a nationwide
14 Cattlemen's tour, and he chairs the Association's Land Resources
15 Committee.
16

17 At the time of the filing of bankruptcy, the Naumans'
18 business operations had three components. First, there was a
19 cow-calf operation in which the calves were sold off of the
20 ranch. Second, the Naumans shipped many of their calves to a
21 feedlot for additional weight gain before sale. By sending the
22 cattle to the feedlot, the Naumans delay the sale of the cattle
23 in hopes of taking advantage of an anticipated market increase in
24 cattle prices. Third, the Naumans had a "bed and breakfast"
25 operation in a second house on the property.
26

27 The bankruptcy court held hearings regarding the Debtors'
28 plan on December 10, 1996, January 6, 1997, and January 24, 1997.

1 The court issued its oral opinion on February 5, 1997, with a
2 modification thereto on February 24, 1997. The court entered its
3 written order on February 27, 1997. This appeal followed.

4 5 **II. ISSUES**

6 Did the bankruptcy court err in finding that the plan was
7 feasible under § 1225(a)(6)?

8 Did the bankruptcy court err in allowing negative
9 amortization of the Ranch Site property?
10

11 **III. STANDARD OF REVIEW**

12 Whether a debtor's plan is feasible under § 1225(a)(6) is a
13 factual determination. In re Rape, 104 B.R. 741, 748 (W.D. N.C.
14 1989); In re Crowley, 85 B.R. 76, 78-79 (W.D. Wis. 1988); see
15 also In re Webb, 932 F.2d 155, 158 (2d Cir. 1991). The fairness
16 of a negative amortization plan is also a question of fact.
17 Corestates Bank v. United Chem. Techs., 202 B.R. 33, 52-53 (E.D.
18 Pa. 1996) (citing Great W. Bank v. Sierra Woods Group, 953 F.2d
19 1174, 1176-77 (9th Cir. 1992)). All findings of fact are
20 reviewed under a clearly erroneous standard, and we give due
21 regard to the opportunity of the bankruptcy court to judge the
22 credibility of the witnesses. Fed.R.Bankr.P. 8013. "A finding
23 of fact is clearly erroneous when after reviewing the evidence we
24 are left with the definite and firm conviction that a mistake has
25 been committed." In re Arnold and Baker Farms, 177 B.R. 648, 653
26 (9th Cir. BAP 1994) (citing In re Contractors Equip. Supply Co.,
27
28

1 861 F.2d 241, 243 (9th Cir. 1988)), rev'd, 85 F.3d 1415 (9th Cir.
2 1996), cert. denied, ___ U.S. ___, 117 S. Ct. 681, 136 L. Ed. 2d
3 607 (1997).

4 5 IV. DISCUSSION

6 A. *Feasibility of the Plan*

7 The Appellants argue that the bankruptcy court erred in
8 confirming the Debtors' plan because it does not meet the
9 feasibility requirement of § 1225(a)(6). Specifically,
10 subsection 1225(a)(6) requires that "the debtor will be able to
11 make all payments under the plan and to comply with the plan."
12 Under this subsection, "[t]he debtor is not required to guarantee
13 the ultimate success of his plan, but only to provide a
14 reasonable assurance that the plan can be effectuated." In re
15 Hopwood, 124 B.R. 82, 86 (E.D. Mo. 1991). However, this
16 reasonable assurance must rise above "bare agronomic
17 feasibility." In re Crowley, 85 B.R. 76, 79 (W.D. Wis. 1988).

18 The Crowley court stated that

19 [s]uch a technical agronomical feasibility
20 determination generally includes a variety of
21 assumptions and the likelihood that these assumptions
22 will occur must be determined by the Court. . . .
23 Because past behavior and productivity are excellent
24 indicators of future productivity, courts have
frequently rejected plans which are premised on highly
optimistic projections of increased production.

25 Id. at 79 (citing In re Cott, 49 B.R. 570 (Bankr. W.D. Mo. 1985);
26 In re Reitz, 79 B.R. 934 (Bankr. Kan. 1987); In re Konzak, 78
27 B.R. 990 (Bankr. N.D. 1987)).

1 Since the Appellants argue that the Debtors' plan is not
2 feasible, the details regarding the ranch's historic performance
3 and the distinguishing characteristics of the Debtors' current
4 operation plan are relevant. The Appellants present four main
5 arguments as to why the confirmed plan is not feasible. These
6 arguments are discussed below.

7
8 **1. The Appellants argue that the ranch capacity will not
support the Debtors' proposed operation.**

9 The lower court found that the Debtors' plan was reasonable
10 and rejected the creditors' contention that the Debtors' planned
11 increase in herd size would overtax the ranch. The ranch is at
12 an elevation of between 4,000 and 5,000 feet above sea level and
13 sometimes experiences severe winters. The previous owner of the
14 ranch had owned the ranch for only three or four years prior to
15 its sale, but indicated that the ranch had historically carried
16 approximately 200 cows.

17
18 The Debtors' cow-calf operation consists of both owned and
19 leased cows. At the time of the confirmation hearing, the
20 Naumans had 91 owned cows and 197 leased cows. In 1997, the
21 Debtors anticipate owning 90 cows and leasing 221 cows from other
22 parties. During the summer months, they will also graze 100
23 yearlings owned by third parties. Mr. Nauman, the debtor,
24 testified that prior to purchasing the ranch, he had been told
25 that there had previously been 325 cows on the ranch year-round
26 and up to 500 stocker cattle in the summer months. Although
27 Appellants' brief claims that there was uncontradicted evidence
28

1 that the winter carrying capacity of the ranch was 200 cows, the
2 record on appeal indicates that the carrying capacity was the
3 subject of varying testimony. The issue is further complicated
4 by the fact that the question of carrying capacity is different
5 from the question of the historical number of cattle on the
6 ranch. Additionally, testimony in the lower court indicated that
7 differences in management practices can affect carrying capacity.

8 The Debtors' management practices differ from those
9 historically found on the ranch. Testimony in the bankruptcy
10 court indicated that the previous owner ran a large-framed breed
11 of cattle, which required a large amount of feed in order for
12 them to calve during the winter months. Regarding grazing
13 practices, the previous owner divided his herd among the
14 available fields and left them there for the entire season. In
15 contrast, the Naumans put a larger number of cattle in one field
16 for a much shorter period of time, and require the cattle to eat
17 everything in the field. The cattle are then moved out of the
18 field for several months, allowing the forage to regrow. The
19 forage in the fields is closely monitored throughout the year.
20 Testimony in the lower court indicated that this approach is not
21 traditional, but that it can be more efficient and can increase
22 the carrying capacity of a given property.

23 The bankruptcy court found there was contradictory testimony
24 regarding how many animals had been on the ranch historically and
25 what change the Debtors' field management practices would have on
26 the carrying capacity. As there were two sets of opinions on the
27
28

1 subject, we cannot say that the bankruptcy court committed clear
2 error in adopting the opinions favorable to the Debtors.

3 **2. The Appellants argue that the Debtors' projection for**
4 **calf and fed steer prices are not supported by historic**
5 **markets or the projections of experts in the cattle futures**
6 **market.**

6 At the February 5, 1997, hearing prior to confirmation, the
7 court noted that the Debtors' plan assumes that the cattle market
8 is at the bottom of a price cycle and that prices will improve in
9 the future. Based on the testimony provided by various
10 witnesses, the bankruptcy court found this assumption to be
11 reasonable. Besides increasing the productivity and efficiency
12 of the ranch through the above methods, the Debtors are also
13 seeking higher prices for the cattle they sell. Rather than sell
14 the cattle at the local market price, the Debtors have begun
15 selling their cattle through a specialized beef marketing firm
16 ("the B3R program") that offers higher prices for so-called
17 "natural beef"--cattle that have not been exposed to hormones or
18 antibiotics. Testimony in the bankruptcy court indicated that
19 this marketing firm has been in operation for the last ten years,
20 and can offer between four and ten cents per pound more for
21 cattle that are considered "natural." The marketing firm's
22 demand for this type of beef currently exceeds its supply.

24 The Debtors also expect to increase revenue by taking
25 advantage of an expected upswing in cattle market prices.
26 Testimony in the bankruptcy court indicated that the cattle
27 industry has been experiencing some of the most economically
28

1 stressful times in its history, and that cattle prices are
2 cyclical. The market price of cattle is expected to begin its
3 increase in middle to late 1997. This upswing is expected at
4 this time because, due to last year's market conditions, many
5 cattle producers began liquidating their cattle, and thus the
6 cattle supply has decreased somewhat. With the expected climb of
7 cattle prices, the Debtors plan to retain ownership of the cattle
8 by sending them to feedlots. By doing so, the Debtors plan to
9 take advantage of the anticipated price increase as well as the
10 cattle's additional weight gain. Testimony and market
11 publications presented in the lower court suggested that extended
12 ownership of the calves was a low-risk method of enhancing
13 returns.
14

15 Regarding the Debtors' projections of future market prices,
16 testimony in the trial court by the feedlot owner as well as the
17 Debtor indicated that the Debtors' price projections are
18 conservative. As provided in the bankruptcy court, the following
19 are the Debtors' price projections, including the natural beef
20 premium of between four and ten cents per pound, compared to the
21 feedlot owner's projections of the generic base price (the price
22 without a premium) for fed cattle:

	Debtors' Projected <u>Premium Price</u>	Feedlot Owner's <u>Projected Base Price</u>
25 1997	\$.71 per pound	\$.68 to \$.72 per pound
1998	\$.75 per pound	mid \$.70's to low \$.80's
26 1999	\$.79 per pound	mid \$.70's to low \$.80's

27 These figures illustrate that the Debtors' price projections,
28

1 even including the natural beef premium, are within the range of
2 what the base price is expected to be. Further, the Debtors are
3 somewhat experienced in feedlot prices, having placed some of
4 their 1994 calves and all of their 1995 calves in the feedlot
5 operation. Lower court testimony indicated that despite high
6 feed costs and fed-cattle prices as low as \$.56 per pound in
7 1995, the Debtors made a profit on their 1995 calves. At the
8 time of the bankruptcy court hearings, the base price for fed
9 cattle was \$.67 per pound.

10
11 In seeking to maximize their revenue with the feedlot
12 strategy, the Debtors plan to purchase some calves and place them
13 directly on the feedlot. The Appellants argue that the Debtors'
14 price projections for calf and fed cattle are not supported by
15 historic market prices. Specifically, the Debtors project that
16 they will sell fed cattle in the fall of 1997 for a base price of
17 \$.67 per pound, pay \$.70 per pound for feeder calves in January
18 of 1998, and sell fed cattle for a base price of \$.71 per pound.
19 The Appellants argue that these numbers are unrealistic because
20 the per-pound price paid for feeder calves normally exceeds the
21 per-pound price received for fed cattle. However, there was also
22 testimony in the lower court suggesting that since the Debtors
23 are not buying feeder calves and selling them as fed cattle on
24 the same day, the prices of the two animals for a given day
25 cannot be compared. The calves will be kept for a number of
26 months and the market price is expected to climb during that
27 period. Additionally, testimony during the hearings suggested
28

1 that fed-cattle prices, which the Debtors will be selling, will
2 begin increasing before the price of the feeder calves, which the
3 Debtors will be buying.

4 Further, during the bankruptcy court proceedings, the
5 Debtors submitted various budget scenarios, one of which dealt
6 with the possible increase in the price paid for feeder calves.
7 Testimony presented in the lower court indicated that the plan
8 was still workable under those various scenarios. Without
9 explanation, the Appellants' brief singles out one of those
10 scenarios (Exhibit 17) and labels it as the Debtors' plan.
11 Although the Appellants are correct that the total profit over
12 five years under that scenario is less than \$5,000.00, this
13 scenario is only one of several scenarios presented to the
14 bankruptcy court. Of the several projections included in the
15 record on appeal, the Appellants have presented no evidence that
16 Exhibit 17 was considered by the bankruptcy court to be the
17 Debtors' most probable projection.

18
19 Based on the above, we cannot say that the lower court was
20 clearly erroneous in this regard.

21 **3. The Appellants argue that the Debtors' plan does not**
22 **show any margin to cover unexpected contingencies.**

23 During the hearings prior to confirmation, the lower court
24 indicated that one of the assumptions of the plan is that the
25 Debtors' performance under the plan will exceed the ranch's
26 historic performance due to improved management practices. These
27 practices include a different grazing pattern for the cattle,
28

1 shifting the calving season to later in the year to avoid the
2 harsher winter season, and different nutritional practices. The
3 Debtors claimed that these changes would reduce the winter feed
4 requirements from the historic two tons per animal to only one-
5 third ton per animal. At the February 5 hearing, the bankruptcy
6 court did not find that the Debtors' plan was reasonable as to
7 the degree to which the different management practices would
8 reduce the cattle's winter feed requirements. The court found
9 that there was uncontradicted testimony that the winters on the
10 ranch were sometimes severe and that the feed requirements
11 increase under such conditions. The court stated that the
12 Debtors' plan would not be found feasible unless the Debtors had
13 sufficient funds available in reserve to purchase an additional
14 .8 tons per animal if it was needed. The court arrived at this
15 figure by adjusting the historic two-ton requirement by the
16 amount, as suggested by expert testimony, that spring calving
17 would reduce the winter feed requirement. The court further
18 suggested that without such a reserve, if the feed is not
19 available when needed, the cows' condition would weaken and the
20 value of the herd would be reduced. Such an occurrence could
21 also impair the security interest of First Security Bank. The
22 dollar amount of the needed feed reserve was calculated at
23 \$26,000.00.
24

25 The court allowed the Debtors to provide this reserve and
26 the plan was confirmed on February 24, 1997. The confirmed plan
27 included a provision which provided the Debtors with up to
28

1 \$26,000 of credit for winter feed. The winter feed loan would be
2 secured by a 40-acre parcel of land in Montana owned by Jeffery
3 Nauman's parents. The Montana parcel also secures First Security
4 Bank's loan. Overall, the court found that the Debtors'
5 financial projections were achievable. The court indicated at
6 the February 5, 1997, hearing that there were "no guarantees, but
7 there never are in farm cases, and I don't think the law requires
8 there to be a guarantee of success."

9 The Appellants argue, however, that further protections are
10 needed for the possible impact of severe weather on the "ranch
11 operation itself" and possible increases in feed costs. The
12 Debtors respond that the income in excess of projected expenses
13 is devoted to debt service rather than creating a cushion for
14 every contingency. Further, the projected income is considered
15 conservative. Thus, the Debtors argue that the conservative
16 projections create a built-in margin. Although § 1225(a)(6)
17 requires more than a mere possibility of success, § 1225(a)(6)
18 also does not require the plan to be "bomb proof," as the
19 Appellants would apparently hope. The Appellants also claim that
20 the Debtors' plan allows for only a \$5,000 margin over four
21 years, although there is no evidence that of the many scenarios
22 presented to the lower court, the exhibit referenced by the
23 Appellants is the Debtors' expected budget. We find that the
24 bankruptcy court did not commit clear error in this regard.
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1 4. The Appellants argue that there is no allowance for
2 death loss or variance in the cow-calf survivability rate.

3 The Debtors have projected a cow-calf survivability rate of
4 95%. The Appellants consider this unreasonable. Testimony in
5 the bankruptcy court indicated that the Debtors' overall
6 historical survivability rate in the winter months has been
7 94.7%. The Debtors are also shifting the calving season for
8 their cattle from the historic January-February-March season to
9 May-June. By doing so, the Debtors intend to take advantage of
10 the warmer weather. Testimony in the lower court indicated that
11 calving typically takes place in the earlier months so that the
12 calves weigh more by the fall season, although this approach is
13 less efficient than calving at the later time. Calving at the
14 later time is expected to reduce the need for certain preventive
15 medications, reduce the amount of supplemental cattle feed
16 required to be purchased during the winter months, and increase
17 the survival rate in the herd. Further, the Debtors' cattle
18 nutritional program was designed by two veterinarians, and
19 testimony also suggested that Debtors' cattle survival rate at
20 the feedlot was better than that of some other producers.

21 The bankruptcy court found that there was contradictory
22 testimony regarding the anticipated survival rate of cattle in
23 the herd. The court found that a number of witnesses had
24 testified on the matter and that the Debtor's projection of a
25 survival rate of 95% was reasonable, given the Debtors' historic
26 performance and the Debtors' plan to shift the calving season to
27 the later time.

1 warmer months of the year.

2 Based on the foregoing, the lower court's determination
3 regarding the feasibility of the Debtors' plan is not clearly
4 erroneous. The lower court was presented with a substantial
5 amount of testimony regarding different aspects of the plan. The
6 testimony was conflicting on some issues, but the record on
7 appeal does not leave a firm and definite conviction that the
8 lower court was mistaken in finding that the plan is feasible.
9 See In re Arnold and Baker Farms, 177 B.R. at 653. Therefore, we
10 **AFFIRM** the bankruptcy court's finding that the plan is feasible.
11

12
13 *B. Permissibility of Negative Amortization*

14 The Appellants argue that the lower court erred in allowing
15 the Debtors' negative amortization plan. Negative amortization
16 occurs when "'part or all of the interest on a secured claim is
17 not paid currently but instead is deferred and allowed to
18 accrue,' with the accrued interest added to the principal and
19 paid when income is higher." Great W. Bank v. Sierra Woods
20 Group, 953 F.2d 1174, 1176 (9th Cir. 1992) (quoting In re Club
21 Assocs., 107 B.R. 385, 398 (Bankr. N.D. Ga. 1989)). "The extent
22 of negative amortization depends upon the difference between the
23 'accrual rate,' or the overall rate of interest to be paid on a
24 claim, and the 'pay rate,' or the rate of interest to be paid on
25 a monthly basis." Id.
26

27 As stated above, the original 1995 contract between the
28 Debtors and Miller-Belza for the Ranch Site property required a

1 purchase price of \$775,000.00, with a \$300,000.00 down payment.
2 The remaining \$475,000.00 was to be paid in annual installments
3 with an 8.5% interest rate. The annual installments were to be
4 \$50,218.00, with the exception of the first year, in which the
5 payment was to be \$42,032.38. The annual payments were to
6 continue until January 3, 2005, when the full balance would be
7 due. The sale contract gave Miller-Belza the right to foreclose
8 on the property in the event of default.

9 The confirmed plan provided the following payment schedule
10 to Miller-Belza for the Ranch Site property:

11 1997: \$8,000.00
12 1998: \$39,950.00
13 1999: \$63,875.00
14

15 The plan provides that, effective October 15, 1996, interest on
16 all sums owed to Miller-Belza will accrue at an annual percentage
17 rate of 8.5%. Effective October 15, 1998, the secured claim of
18 Miller-Belza is amortized over an 18-year term at 8.5% annual
19 interest, with annual installments of \$63,875.00. The entire
20 balance is due in the year 2005. In the event of default, the
21 plan requires that the property be sold at auction.

22 The Appellants argue that the Debtors' plan of negative
23 amortization of the ranch property violates several of the
24 factors delineated in Great Western Bank v. Sierra Woods Group,
25 953 F.2d 1174, 1177-78 (9th Cir. 1992). The bankruptcy court
26 found that the plan met these general requirements. In Great
27 Western, a Chapter 11 case, the Ninth Circuit held that negative
28

1 amortization was not per se impermissible under the "fair and
2 equitable" requirement of § 1129(b). Rather, the court held that
3 the permissibility of a negative amortization plan under 1129(b)
4 must be decided on a case-by-case basis. Id. The Great Western
5 court also provided a nonexclusive list of factors relevant to
6 determining whether the negative amortization plan is
7 permissible. These factors are:

- 8 1. Does the plan offer a market rate of interest and
9 present value of the deferred payments;
- 10 2. Is the amount and length of the proposed deferral
11 reasonable;
- 12 3. Is the ratio of debt to value satisfactory throughout
13 the plan;
- 14 4. Are the debtor's financial projections reasonable and
15 sufficiently proven, or is the plan feasible;
- 16 5. What is the nature of the collateral, and is the value
17 of the collateral appreciating, depreciating, or
18 stable;
- 19 6. Are the risks unduly shifted to the creditor;
- 20 7. Are the risks borne by one secured creditor or class of
21 secured creditors;
- 22 8. Does the plan preclude the secured creditor's
23 foreclosure;
- 24 9. Did the original loan terms provide for negative
25 amortization; and
- 26 10. Are there other adequate safeguards to protect the
27 secured creditor against plan failure.

28 Id. at 1178 (citing In re Apple Tree Partners, 131 B.R. 380, 398
(Bankr. W.D. Tenn. 1991)). Bankruptcy courts are not required to
refer to each of these factors when considering plans that
propose negative amortization. Id. at 1178. Another court has

1 stated that the main inquiry among these factors is whether the
2 amount and length of the proposed deferral is reasonable. In re
3 Bouy, Hall and Howard and Assocs., 141 B.R. 784, 791 (Bankr. S.D.
4 Ga. 1992).

5 As a technical matter, Great Western and all of the other
6 cases cited by the Appellants deal only with the permissibility
7 of negative amortization under the "fair and equitable"
8 requirement of 1129(b). As pointed out by the Debtors, Chapter
9 12 has no "fair and equitable" provision corresponding to
10 § 1129(b),³ and thus Great Western is not controlling in this
11 case. Another court has found many of these factors to be an
12 accumulation of some of the requirements of confirmation found in
13 sections 1129 and 1141(b). In re Bouy, 141 B.R. at 791.
14 Therefore, Appellants' contention that the bankruptcy court erred
15 by misapplying the Great Western factors is technically
16 incorrect. As a Chapter 12 case, the bankruptcy court was under
17 no specific obligation to apply the Great Western factors to the
18
19

20 ³ Section 1225(a)(5)(B) requires that in the event that the
21 secured creditor does not accept the plan and the debtor does not
surrender the property:

22 the plan provides that the holder of
23 such claim retain the lien securing
such claim; and
24 the value, as of the effective date
of the plan, of property to be
25 distributed by the trustee or the
debtor under the plan on account of
26 such claim is not less than the
allowed amount of such claim.

27
28 The Appellants have not argued that the Debtors' plan does not
fulfill the requirements of § 1225(a)(5).

1 Debtors' negative amortization plan.

2 Although not controlling in this case, the bankruptcy court
3 specifically applied the factors of Great Western and found that
4 the negative amortization plan in this case met the Great Western
5 requirements. Each of the Appellants' arguments regarding the
6 individual factors is discussed below.

7 **1. Appellants argue that the second factor is not met in**
8 **that the amount and length of the interest deferral is**
9 **unreasonable.**

10 The bankruptcy court specifically found that the 21-month
11 partial deferral was reasonable given the loan-to-value ratio and
12 the automatic auction sale provisions in the plan. The court
13 found that the loan-to-value ratio was 71% at that time and would
14 reach 75% under the negative amortization plan. Further, the
15 interest rate of 8.5% is the same as that under the Debtors' sale
16 contract, which was entered into only two years before the plan's
17 confirmation. Another court has found a negative amortization
18 rate for the first four years to be acceptable under §
19 1225(a)(5). In re Big Hook Land & Cattle Co., 81 B.R. 1001, 1006
20 (Bankr. Mont. 1988). The court's finding that this deferral was
21 reasonable was not clearly erroneous.

22 **2. Appellants argue that the third factor of a satisfactory**
23 **debt-to-value ratio and the fifth factor of the value of the**
24 **collateral are not met.**

25 As stated above, the bankruptcy court found that despite the
26 21-month partial deferral of interest, the loan-to-value ratio
27 would increase only slightly, from 71% to 75%. Appellants argue
28 that by the time the debt is reamortized in 1998, the Debtors

1 will have approximately \$20,000 in equity compared to over
2 \$200,000 in equity three years previously. However, as the
3 bankruptcy court explained in its findings, the fact that there
4 is subordinate debt is not relevant to the adequate protection of
5 the Appellants. The Appellants also argue that the Debtors'
6 field management practices create a serious prospect of waste
7 being conducted on the property due to overgrazing. Although
8 some witnesses in the bankruptcy court hearings expressed this
9 concern, there was also ample testimony regarding the successful
10 use of the Debtors' grazing techniques. The bankruptcy court's
11 findings in this regard were supported by evidence and are not
12 clearly in error.
13

14 **3. Appellants argue that the plan is not feasible and**
15 **therefore the fourth factor is not met.**

16 For the reasons stated above regarding the bankruptcy
17 court's finding that the plan is feasible, the lower court's
18 finding in this regard was not clearly erroneous.

19 **4. Appellants argue, pursuant to the sixth and seventh**
20 **factors, that the risks are unduly shifted to the creditor**
21 **and that the risks are borne by one creditor or a class of**
22 **creditors.**

23 The Appellants argue that the plan effectively requires them
24 to loan additional money over the next three years and that they
25 do not have the resources to do so. As stated above, the
26 interest deferral period lasts for approximately 21 months.
27 Under the confirmed plan, the full balance on the note remains
28 due at the same time as originally contracted between the
parties. There are three secured creditors in this case, Miller-

1 Belza, Mr. Nauman's father, and First Security Bank. Although a
2 negative amortization plan necessarily shifts some additional
3 risk to the creditors, it does not appear that the 21-month
4 deferral plan unduly shifts the burden.

5 **5. Appellants argue that the eighth and tenth factors, the**
6 **possibility of foreclosure and adequate safeguards to**
7 **protect the secured creditor, are also not met.**

8 The plan does not permit foreclosure, but it does allow an
9 auction in the event of a missed payment. The Appellants argue,
10 however, that the plan does not provide sufficient protection in
11 the first two years since the payments by the Debtors will be
12 minimal at best. Appellants appear to argue that if the Debtors
13 fail in the first year, then there will be insufficient feed for
14 the cattle, overgrazing will occur, and waste will occur on the
15 ranch. Without explanation, the Appellants suggest the need for
16 "adequate remedies" and "greater safeguards" to address these
17 concerns. However, this argument ignores the fact that the
18 bankruptcy court required, as a condition for confirmation, that
19 the Debtors have in place a \$26,000 reserve specifically for
20 cattle feed. As such, it does not appear that the bankruptcy
21 court erred in this regard.

22 Based on the above, we are not left with a firm and definite
23 conviction that the lower court erred in permitting the Debtors'
24 negative amortization plan. Therefore, we **AFFIRM** the bankruptcy
25 court's allowance of the negative amortization plan.
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V. CONCLUSION

Appellants claim that the Debtors' plan is not feasible and the bankruptcy court erred in confirming the plan. However, the bankruptcy court heard conflicting testimony on the many factual issues that compose the overall feasibility of the plan. The bankruptcy court also had the opportunity to assess the credibility of the many witnesses. The factual findings of the bankruptcy court in this regard were not clearly erroneous. The bankruptcy court also found that the negative amortization plan met the general standards of fairness that the Ninth Circuit Court of Appeals has required of such plans under other statutes. Taking all of the bankruptcy court's findings into consideration, this panel is not left with a firm conviction that the court below erred in allowing the negative amortization plan. Therefore, we **AFFIRM** the confirmation order of the bankruptcy court.